NO. 22-_____

In the Supreme Court of the United States

LEONARDO NUNCIO,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition for a Writ of Certiorari to the Texas Court of Criminal Appeals

PETITION FOR A WRIT OF CERTIORARI

OSCAR O. PEÑA, J.D.
COUNSEL OF RECORD
OSCAR O. PEÑA LAW, PLLC
1720 MATAMOROS ST.
LAREDO, TX 78040
(956) 722-5167
OSCAR@OSCARPENALAW.COM

AUGUST 31, 2022 *COUNSEL FOR PETITIONER*

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QUESTIONS PRESENTED

1. Is Texas's obscene harassment statute (Tex. Penal Code 42.07(a)(1) and (b)(3)) unconstitutionally vague and overbroad?

2. Does the *Miller v. California* obscenity test chill critical speech and emotional speech?

LIST OF PROCEEDINGS

Court of Criminal Appeals of Texas
No. PD-0478-19
Ex Parte Leonardo Nuncio
Date of Final Opinion: April 6, 2022
Date of Rehearing Denial: June 8, 2022

Fourth Court of Appeals, San Antonio, Texas
No. 04-18-00127-CR
Ex Parte Leonardo Nuncio
Date of Final Judgment: April 10, 2019

County Court, Webb County, Texas
Cause Number: 2017 CVJ 002365 C1
Ex Parte Leonardo Nuncio
Date of Final Judgment: February 12, 2018

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

REHEARING ORDER

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

JUDICIAL RULES

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

OPINIONS BELOW

The opinion and judgment of the Texas Fourth Court of Appeals is published and reported at 579 S.W.3d 448 (Ct. Crim. App. — 2022). (App.37a). The dissenting opinion of Justice Rodriguez appears at App.53a.

The opinion and judgment of the Texas Court of Criminal Appeals is published and reported at — S.W.3d —, 2022 WL 1021276. (App.1a).

The order denying a writ of habeas corpus of the County Court, Webb County, Texas, is included at App.57a.

JURISDICTION

This matter arose from a challenge to the validity of the Texas obscene harassment statute (Tx. Pen. Code 42.07(a)(1) and (b)(3)) on the grounds that it was repugnant to the First Amendment to the Constitution of the United States. It was filed in the County Court at Law Number One in Webb County, Texas. The trial court denied relief on February 12, 2018. The challenge was appealed up to the highest Court of the State of Texas. There, relief was denied on April 6, 2022. Rehearing was denied on June 8, 2022. Therefore, jurisdiction of the U.S. Supreme Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISION INVOLVED

Tex. Penal Code 42.07 (in relevant part)
Obscene Harassment

(a) A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, the person:

(1) initiates communication and in the course of the communication makes a comment, request, suggestion, or proposal that is obscene[.]

[. . .]

(b) In this section:

[. . .]

(3) "Obscene" means containing a patently offensive description of or a solicitation to commit an ultimate sex act, including sexual intercourse, masturbation, cunnilingus, fellatio, or anilingus, or a description of an excretory function.

STATEMENT OF THE CASE

This is an appeal from a denial of habeas corpus relief. Nuncio challenged Texas Penal Code § 42.07(a), (a)(1) and (b)(3) as being unconstitutionally void for vagueness and over broad under the First Amendment.

He also challenged the *Miller v. California* test. *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607 (1973).

REASONS FOR GRANTING THE PETITION

Section 42.07(a)(1) of the Penal Code, the obscene harassment statute, makes it an offense for a person with the specific intent to harass, annoy, alarm, abuse, torment, or embarrass another to initiate communication and, in the course of the communication, make a comment, request, suggestion, or proposal that is "obscene." Tex. Penal Code Ann.§ 42.07(a)(1).

This statute is unconstitutionally vague and over-broad in violation of the First Amendment to the United States Constitution. (App.1a).

The intermediate appellate court, the Texas Fourth Court of Appeals, addressed these questions and issued a split opinion. In a dissent, Justice Rodriguez held that "there are too many commonplace scenarios in which "a person of ordinary intelligence" would not have fair notice of what conduct the statute prohibits until after an arrest is made." (App.54a). She also noted that "[u]nder the current statutory language, everyday conduct which is not usually considered criminal under

general social norms could be criminalized without adequate notice." (App.54a)

Then, the Texas Court of Criminal Appeals (referred to herein as the "Texas Court") accepted discretionary review and held that § 42.07(a)(1) is a content-based regulation of speech implicating the First Amendment. (App.14a). The Texas Court then analyzed whether the statute's definition of obscenity is "distinct from or more expansive" than *Miller*. (App.18a). It concluded that "it is self-apparent that [the statute's definition of obscenity] reaches speech beyond the scope of *Miller*" and includes protected speech. (App.18a).

The Texas Court then noted that "[t]o succeed in an overbreadth challenge, the person challenging the statute 'must demonstrate from the text [of the law] and from actual fact that a substantial number of instances exist in which the law cannot be applied constitutionally.'" *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 14 (1988). (App.20a). However, the Court did not decide the issue because of "Appellant's mistaken belief" that the State had the burden of going forward and did not attempt to show that a substantial number of instances exist in which the statute cannot be applied constitutionally. (App.20a)

The Texas Court then addressed several vagueness challenges. It found that the phrase "ultimate sex act" was not vague and cited two cases in support:

Pettijohn v. State, 782 S.W.2d 866 (1989) (alleging in a letter that the victim was making sexual advances to little boys and molesting little children is not a description of an ultimate sex act),

Lefevers v. State, 20 S.W.3d 707 (Tex. Crim. App. 2000) (telling a woman 'I want to feel your breasts' is not a description of an ultimate sex act)

According to the Texas Court, the cases show a "consistent strand" because it requires more than just general averments of sexual activity. *Lefevers*, 20 S.W. 3d at 712. (App.25a).

The Texas Court then concluded that "patently offensive" is not unconstitutionally vague because it is defined in terms of a community standard of decency. (App.27a).

The Texas Court then construed the word "another." The Court states "although it is possible to construe some of the conduct subsections to allow the conduct to be directed at some person other than the intended target of emotional harm, we find such a construction unreasonable." (App.28a).

ARGUMENT

The statute's inherent vagueness encourages an unconstitutional level of delegation of decision making and control over the characterization of the conduct as a crime to the complaining witness. The degree to which the power to influence arrest and/or prosecution is placed in the hands of the complaining witness is unconstitutional and inconsistent with a system of law required to be uniformly enforced. *Kolender v. Lawson*, 461 U.S. 352 (1983).

The Texas Court does not reconcile many of the defects that resulted in the striking of 42.07's predecessor statute in *Kramer v. Price*, 712 F.2d 174 (5th Cir. 1983). In *Kramer*, the Fifth Circuit held that the predecessor statute to 42.07(a)(1) was unconstitutionally vague because the statute did not construe the words annoy and alarm in a manner that would lessen their inherent vagueness and because the statute failed to specify whose sensibilities must be offended.

Additionally, the statute does not contain any standard or guidance to employ regarding the use of other forms of accordingly intentional, targeted communications that include metaphors, hyperbole, gossip, rebuke.

The Texas Court noted that Nuncio also challenged the *Miller* standard. (App.16a). The three-prong test established in *Miller v. California* provides the standard for determining whether material is obscene. The trier of fact considers:

(a) whether 'the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest,

(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and

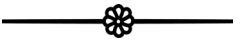
(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller v. California, 413 U.S. 15, 93 S. Ct. 2607 (1973)

The *Miller v. California* test for determining obscenity chills critical speech and emotional speech. The *Miller v. California* standard does not accommodate the cathartic value of emotional speech, the hyperbole of sharp criticism, or the clumsiness of sexual overture. *Miller v. California* and its progeny fail to place any value on emotional speech as a form of self-actualization and/or catharsis.

Furthermore, the Texas Court employed construction principles wrongly in this case because the list of items is not "readily susceptible" to *esjudem generis* construction. *See Ex Parte Thompson*, 442 S.W.3d 325 (Tex. Crim. App. 2014). See also *U.S. v. Stevens*, 559, U.S. 460 (2010). *Lefevers* relies on the premise that the list of items that describe obscenity in the statute have an inherent similarity that lends itself to construction under *ejusdem generis*. However, a person of ordinary intelligence might reasonably struggle to anticipate how the phrase "or a description of an excretory function" is included and how it should be interpreted on a list of "ultimate sex acts". It is unclear whether

the "description of an excretory function" must be sexual in nature, or simply patently offensive.



EPILOGUE

An article appeared in the New York Times website on Saturday July 27, 2017, entitled: *Anthony Scaramucci's Uncensored Rant: Foul Words and Threats to Have Priebus Fired*. https://www.nytimes.com/2017/07/27/us/politics/scaramucci-priebus-leaks.html. The article describes comments made through a reporter by Anthony Scaramucci, at the time a Senior Republican Political Advisor. Scaramucci disparaged a fellow White House adviser, saying:

> I'm not Steve Bannon. I'm not trying to suck my own cock . . .

On the following day, July 28, 2017, The New York Times published a follow up article online entitled *Why the Times Published Scaramucci's Profanities* (https://www.nytimes.com/2017/07/28/reader-center/times-published-scaramucci-profanities.html) explaining its decision to publish Scaramucci's comments. It stated:

> Scores of our readers expressed surprise when they saw that we published the vulgar comments . . . [w]hile many applauded the decision, some were outraged and others were simply confused . . .

The Times explained that their top editors "discussed whether it was proper." The readers' reactions suggest that the language was patently offensive. The New York Times' difficulty in deciding whether

to publish the "vulgar" comments also suggests that the language was "patently offensive." Also, Scaramucci's rapid termination after only ten days after the making of the vulgar comments, would tend to show that his vulgarities were judged by the community standards inside the Beltway and found to be patently offensive. (https://www.bbc.com/news/world-us-canada-40684697).

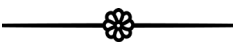
No one called for Scaramucci's arrest.

Nevertheless, the communication was initiated, was communicated through "another", was targeted, was intended to embarrass Steve Bannon, and it arguably contained a patently offensive description of combined masturbation and fellatio.

The phrase used by Scaramucci is simply a metaphor for grandstanding, overconfidence, and/or self-promotion. (https://www.urbandictionary.com/define.php?term=sucking%20my%20own%20dick) It's clear from context that Scaramucci meant it as a critique and a metaphor. Nevertheless, Scaramucci's rant meets the elements of the statute. This example demonstrates to the Court that a substantial number of metaphors and figures of speech, including but not limited to, "suck your own cock," "eat me," "go fuck yourself," and other figures of speech exist to which the statute cannot be applied constitutionally.

Pursuant to Rule 10(b) of the Supreme Court Rules, the question presented herein constitutes a decision of a state court of last resort involving an important federal question in a way that conflicts with the decision of a United States court of appeals; see *Kramer v. Price*, 712 F.2d 174 (5th Cir. 1983). Furthermore, pursuant to Rule 10(c), a state court has decided an important question of federal law that

has not been, but should be, settled by this Court. Additionally, a state Court has decided an important federal question in a way that conflicts with relevant decisions of this Court.



PRAYER

WHEREFORE, PREMISES CONSIDERED, Nuncio prays that this Court grant certiorari, vacate the prior judgment of the Texas Court of Criminal Appeals, and remand for further consideration of his First Amendment claims. In the alternative, the Court should grant plenary review to decide the questions presented herein or grant such other relief as justice requires.

Respectfully submitted,

OSCAR O. PEÑA, J.D.
COUNSEL OF RECORD
OSCAR O. PEÑA LAW, PLLC
1720 MATAMOROS ST.
LAREDO, TX 78040
(956) 722-5167
OSCAR@OSCARPENALAW.COM

COUNSEL FOR PETITIONER

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